

01:57PM

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK

3 STEPHEN KERSHNAR,

4 Plaintiff,

Case No. 1:23-CV-525
(LJV)

5 vs.

August 17, 2023

6 **STEPHEN H. KOLISON, JR.,** in his
7 individual capacity and his
8 official capacity as the President
9 of the State University of New York
at Fredonia, and

10 **DAVID STARRETT,** in his individual
11 capacity and official capacity as
12 Executive Vice President and
Provost of the State University of
New York at Fredonia,

13 Defendants.

14 **STATUS CONFERENCE via ZOOM FOR GOVERNMENT VIDEOCONFERENCE**
15 **BEFORE THE HONORABLE LAWRENCE J. VILARDO**
16 **UNITED STATES DISTRICT JUDGE**

17 **APPEARANCES:** **LIPSITZ GREEN SCIME CAMBRIA LLC**

BY: BARRY N. COVERT, ESQ.

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Buffalo, New York 14202

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For the Plaintiff

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15 **DEPUTY CLERK: COLLEEN M. DEMMA**

16 **COURTREPORTER: ANN M. SAWYER, FCRR, RPR, CRR**
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21 * * * * * * * *

22 (Proceedings commenced at 2:03 p.m.)

02:03PM 23 THE COURT: Can everyone hear me?

02:03PM 24 THE CLERK: Yes, Judge. I'll call the case.

02:03PM 25 United States District Court for the Western District
02:03PM 26 of New York is now in session, the Honorable Lawrence J.
02:03PM 27 Vilaro presiding.

02:04PM 28 23-CV-525, Kershner versus Kolison, et al.

02:04PM 29 Attorneys Barry Covert, Adam Steinbaugh, and Robert
02:04PM 30 Corn-Revere on behalf of the plaintiff.

02:04PM 31 Assistant Attorneys General Jennifer Metzger Kimura
02:04PM 32 and Alyssa Pantzer appearing on behalf of the defendants.

02:04PM 1 All parties are appearing by Zoom videoconference.

02:04PM 2 This is the date set for a status conference.

02:04PM 3 THE COURT: Okay. Good afternoon, everyone.

02:04PM 4 Let me start by saying what I've been saying at the
02:04PM 5 beginning of all these conferences that I've done by Zoom or
02:04PM 6 by phone, and that's no one is to record or rebroadcast this
02:04PM 7 in any way. That's under penalty of contempt and the
02:04PM 8 sanctions that might go along with it.

02:04PM 9 Okay. So the reason I thought I would get everyone
02:04PM 10 together was that I do think that we need a hearing,
02:04PM 11 especially given the local rules for the Western District that
02:04PM 12 I've familiarized myself with, and I think I do need a
02:05PM 13 hearing. So I'd like to schedule that in relatively short
02:05PM 14 order, and I didn't think that that was a good enough reason
02:05PM 15 to bring folks from out of town here, so I thought that we
02:05PM 16 could do this by Zoom.

02:05PM 17 So when can we -- when can we do the hearing? How
02:05PM 18 long is the hearing going to last, and when can we do it?
02:05PM 19 Thoughts from either side.

02:05PM 20 I'll hear from the defense first, since it's the
02:05PM 21 defense that has been pushing for -- or, that was pushing for
02:05PM 22 the hearing, so I'll hear from you folks, first.

02:05PM 23 MS. KIMURA: Judge, you know, we would like as long
02:05PM 24 as possible. We were thinking at some point in October.

02:05PM 25 One of the things was that we were looking into

1 getting an expert as it relates to -- we brought it up I think
2 during oral argument or in our papers about getting an expert
3 or a psychologist or psychiatrist, you know, that's -- that's
4 what we were initially thinking.

5 THE COURT: I'd like to do it before October. I'd
6 like to do it sooner than that, but I hear what you're saying.

7 What's the plaintiff's position? Who's going to
8 speak?

9 MR. COVERT: I will, Your Honor. And please let me
10 know if you can't hear me.

11 THE COURT: I can hear you.

12 MR. COVERT: Thank you, Judge.

13 I think that a reasonable period of time, given that
14 we are towards the middle of August and we have Labor Day
15 coming up, would be shortly after Labor Day.

16 THE COURT: Yeah, I think -- yeah, I was thinking
17 toward the middle of -- the second, third week in September,
18 somewhere in through there --

19 MR. COVERT: Yes.

20 THE COURT: -- is what I was thinking.

21 MR. COVERT: Yes. And, Your Honor, if I can just
22 state as well, what we would propose is our -- obviously, the
23 defendant's request for this factual hearing and their
24 witnesses will dictate to a large extent who our witnesses are
25 going to be. So the sooner -- we do anticipate that we will

1 call witnesses, I want to make that clear. Who those
2 witnesses will be, will be dictated by the experts that they
3 name, and the summary that they provide as a standard as to
4 what that expert will testify to.

5 We already have discussed who our potential experts
6 will be, but we don't want to address issues that are not
7 raised by the defense in the factual hearing. So the sooner
8 they can identify their factual witnesses, we will be able to
9 determine ours. But I don't see any reason why we can't do
10 that in the second or third week of September.

11 We will also ask for the immediate disclosure,
12 because we anticipate that there's no doubt that they're going
13 to be calling the FBI agent, for example, that submitted an
14 affidavit, and that those individuals will be relying upon
15 some documents that can be shared at this point. We have
16 tried through FOIA since basically the inception of the case
17 to get a copy of any police reports that are related to this
18 911 calls, social media documents relating to threats, police
19 reports from the local police department if anything was
20 referred out. The sooner they can get that to us for our
21 experts to review to come up with their opinions, we can share
22 then that review and our opinion with the defendants, that
23 would be appreciated. But I agree with the Court, second or
24 third week of September, there is no reason we can't all
25 accommodate that as a return date for a factual hearing.

02:08PM 1 THE COURT: Okay. And how long do we think this
02:08PM 2 hearing's going to take? I mean, I don't want to set aside
02:08PM 3 more than a day or two for it.

02:08PM 4 MR. COVERT: I suspect two days, Your Honor. I don't
02:08PM 5 know how many witnesses they're going to call. I suspect
02:08PM 6 we're probably going to call two witnesses. I don't think
02:08PM 7 that any of these witnesses are going to be particularly long
02:08PM 8 with relation to their direct or their cross-examination, I
02:09PM 9 don't want to speak for the defendants, but I anticipate --
02:09PM 10 especially if we can get disclosure of all related
02:09PM 11 documents --

02:09PM 12 THE COURT: Right.

02:09PM 13 MR. COVERT: -- that have been reviewed now, and
02:09PM 14 aren't asking for them at the time of the hearing to determine
02:09PM 15 what they're relying upon. I -- I would carve out two days,
02:09PM 16 Your Honor, and hope that we don't need the entire two days.

02:09PM 17 THE COURT: So, Ms. Kimura, let me ask you, who do
02:09PM 18 you anticipate calling? I mean, obviously, you'll end up --
02:09PM 19 you anticipate calling Mr. Isaacson, right?

02:09PM 20 MS. KIMURA: Yes, that was definitely on our list.
02:09PM 21 We were looking through, you know, any of the witnesses that
02:09PM 22 we submitted. I think that Lisa Melohusky might be one.

02:09PM 23 I -- we were looking into getting the psychiatrist or
02:09PM 24 psychiatrist, but that was the -- other than that, you know,
02:09PM 25 and I didn't actually carve out the rest of the now proposed

02:09PM 1 witnesses.

02:09PM 2 THE COURT: Yeah, no, no, and I'm not asking -- and
02:09PM 3 I'm not asking you to commit to that now, I just want to get a
02:10PM 4 sense.

02:10PM 5 MS. KIMURA: And I also would probably call the new
02:10PM 6 interim chief of police, who is Charles Holder.

02:10PM 7 THE COURT: I take it you're not going to call the
02:10PM 8 president, because the motivation behind the decision is not a
02:10PM 9 question of fact, right? The motivation behind -- we're all
02:10PM 10 agreeing that the motivation, or at least your position is
02:10PM 11 that the motivation is the safety, and so that's the only real
02:10PM 12 issue is the safety issue, right?

02:10PM 13 MS. KIMURA: Yes, Your Honor.

02:10PM 14 THE COURT: Do you agree with that, Mr. Covert?

02:10PM 15 MR. COVERT: We agree that that's their position.

02:10PM 16 THE COURT: Right.

02:10PM 17 MR. COVERT: Depending upon what their experts are
02:10PM 18 going to testify to, would -- and whether that opens that
02:10PM 19 door, that we would want to have him called or not.

02:10PM 20 I personally would like to keep this as simple as
02:10PM 21 possible, this --

02:10PM 22 THE COURT: Yep.

02:10PM 23 MR. COVERT: -- relying upon the safety.

02:10PM 24 THE COURT: Yep.

02:10PM 25 MR. COVERT: But if they want -- if they want to open

02:10PM 1 that door --

02:10PM 2 THE COURT: Yep.

02:10PM 3 MR. COVERT: -- and start bringing in other factors,
02:10PM 4 then I don't want to preclude us from addressing them
02:10PM 5 appropriately.

02:10PM 6 THE COURT: Absolutely. Okay. So, Colleen, what
02:11PM 7 does our -- what does our schedule look like? We'll propose
02:11PM 8 some dates and see if that might work for folks.

02:11PM 9 THE CLERK: Okay, Judge.

02:11PM 10 MS. PANTZER: Sorry. Just one hurdle that we have
02:11PM 11 with the mid-September date, Your Honor, I did want to -- and
02:11PM 12 we'll -- we'll adjust as necessary, as the Court deems
02:11PM 13 necessary. But Chief Isaacson is retired, and he does intend
02:11PM 14 to travel essentially across country with an RV from -- in the
02:11PM 15 mid-September area. So he had indicated early October,
02:11PM 16 because he'll be set in one city, and he'll know where he's
02:11PM 17 traveling back to Buffalo from.

02:11PM 18 I just -- I understand the Court wants to get this
02:11PM 19 done sooner, rather than later, but I did want just, you know,
02:11PM 20 to point that out.

02:11PM 21 THE COURT: Let me ask you this. When is he leaving?

02:11PM 22 MS. PANTZER: He's leaving early September.

02:11PM 23 THE COURT: Colleen --

02:12PM 24 MR. COVERT: Your Honor, if we want to do this the
02:12PM 25 second week of September, that actually works best for us.

02:12PM 1 Mr. Steinbaugh just texted me that he's going to be traveling
02:12PM 2 September 20th, and he would prefer to be here. But if we --
02:12PM 3 if he's not able to be here because of his schedule, it is
02:12PM 4 what it is, and we will proceed. But the second week of
02:12PM 5 September, if we can let Mr. Isaacson know now, I would assume
02:12PM 6 that he can accommodate that if we let him know now to make
02:12PM 7 sure he's there if we choose the second week of September.

02:12PM 8 MS. PANTZER: So September 11th and 12th, all of the
02:12PM 9 Buffalo regional office assistant attorney generals, including
02:12PM 10 Jenna and I, will be in Albany for a camp -- we call it Camp
02:12PM 11 AG -- so, for training. So that, those two days definitely
02:12PM 12 aren't going to be available for Jenna and I. But otherwise,
02:12PM 13 we'll work around the Court's schedule, certainly.

02:12PM 14 MR. COVERT: Your Honor, my -- my calendar, the 13th,
02:13PM 15 14th and 15th are wide open. If the Court would want to give
02:13PM 16 them a day to travel, I don't find that to be unreasonable.
02:13PM 17 And then we can -- so they travel on the 13th back from their
02:13PM 18 camp, and then we can conduct this on the 14th and 15th, would
02:13PM 19 be wide open for me.

02:13PM 20 THE COURT: What's my calendar look like, Colleen?

02:13PM 21 THE CLERK: So, Judge, I have you out of the district
02:13PM 22 on Friday the 15th.

02:13PM 23 THE COURT: Oh, right.

02:13PM 24 THE CLERK: Okay?

02:13PM 25 THE COURT: Yes, right.

02:13PM 1 THE CLERK: We do have Wednesday, September 13, is
02:13PM 2 wide open. And Thursday, I can certainly move around some
02:13PM 3 things to free that day up.

02:13PM 4 THE COURT: So is the 13th and 14th doable?

02:13PM 5 MS. KIMURA: I, Your Honor, I think the 13th we are
02:13PM 6 still -- it's that Wednesday, we're still at the AG Camp.

02:13PM 7 MR. COVERT: How about -- how about the 14th and the
02:13PM 8 18th, Your Honor?

02:13PM 9 THE CLERK: Judge --

02:13PM 10 THE COURT: Go ahead.

02:13PM 11 THE CLERK: Judge, you're not here the week of the
02:13PM 12 18th.

02:13PM 13 THE COURT: I'm gone that entire --

02:14PM 14 THE CLERK: That's --

02:14PM 15 THE COURT: -- oh, yeah, I know what that week is,
02:14PM 16 yes.

02:14PM 17 THE CLERK: Yep.

02:14PM 18 MR. COVERT: Your Honor, they're the ones asking for
02:14PM 19 the hearing, so I think that unfortunately we need to -- we're
02:14PM 20 trying to accommodate their schedules, but I think the 13th
02:14PM 21 and 14th.

02:14PM 22 THE COURT: We can do the 13th and 14th, Colleen?

02:14PM 23 THE CLERK: Yes, Judge.

02:14PM 24 THE COURT: Okay. Let's do that. Let's do that.

02:14PM 25 Let's do the 13th and 14th. And -- and, yes, I want a witness

02:14PM 1 list from the defendants. Let's say -- today is the 17th? So
02:14PM 2 I'll want a witness list from the defendants by no later than
02:14PM 3 next Wednesday. What's that, the 20 --

02:14PM 4 THE CLERK: The 23rd, Judge.

02:14PM 5 THE COURT: -- the 23rd? Okay. And then I'll want
02:14PM 6 the same from the plaintiffs no later than the following
02:15PM 7 Monday.

02:15PM 8 THE CLERK: The 28th.

02:15PM 9 THE COURT: And --

02:15PM 10 MS. PANTZER: Your Honor, just -- I understand that
02:15PM 11 we are the ones requesting the hearing. But I believe the
02:15PM 12 burden on a preliminary injunction is with plaintiffs. Is
02:15PM 13 there any way we can switch the order in order for plaintiffs
02:15PM 14 to submit the witness list first? We've -- we've essentially
02:15PM 15 identified our witnesses, Your Honor, by providing all of the
02:15PM 16 declarations in support of our motion. I mean --

02:15PM 17 THE COURT: Well, then, that's easy. So then your --
02:15PM 18 then your witness list is what it is, and you've just given it
02:15PM 19 to the plaintiffs.

02:15PM 20 MS. PANTZER: Well, I think we all --

02:15PM 21 THE COURT: So the plaintiffs don't think there's a
02:15PM 22 need for an evidentiary hearing. You folks have said there's
02:15PM 23 a need for the hearing. So, I mean, it is the burden of the
02:15PM 24 plaintiff to get the preliminary injunction but, I mean, I
02:15PM 25 think the whole purpose of the hearing is for you folks to

02:16PM 1 convince me that the reason behind your decision, that is that
02:16PM 2 there is a danger on the -- in the community, is a real
02:16PM 3 danger.

02:16PM 4 I mean, I suppose I can make the plaintiffs go first,
02:16PM 5 but the plaintiffs are just going to, you know, put on
02:16PM 6 somebody that says there's no danger there. And it just seems
02:16PM 7 to me we'll have things backwards, given where we are on this.

02:16PM 8 I'm happy to listen. I'm happy to -- to listen to
02:16PM 9 your thoughts on this as to why the plaintiffs should go
02:16PM 10 first, but it doesn't seem to me to be a situation where they
02:16PM 11 should.

02:16PM 12 MR. COVERT: Your Honor, I think you're right. And
02:16PM 13 our position is we submit on the papers, so we think the Court
02:16PM 14 can rule based on what's been submitted. So if they want to
02:16PM 15 rebut and provide proof that there's -- that they can
02:16PM 16 establish a need for is continued -- I don't want to
02:17PM 17 characterize it, but --

02:17PM 18 THE COURT: No, no, no, I understand what you're
02:17PM 19 saying, Mr. Covert, and I think I agree with you. So, yeah, I
02:17PM 20 don't see a reason to switch the order of the submissions. I
02:17PM 21 mean, you just made it pretty clear, Ms. Pantzer, that it's
02:17PM 22 not going to be that onerous for you to provide a witness
02:17PM 23 list.

02:17PM 24 So, yeah, I think do that. Exchange the documents
02:17PM 25 that Mr. Covert's talking about. Get that done in short

02:17PM 1 order, and let's do the hearing in short order.

02:17PM 2 MR. COVERT: Your Honor, I don't see any reason that
02:17PM 3 the AG's office does not immediately provide us with all
02:17PM 4 related documents that have been reviewed by the experts or
02:17PM 5 relied upon by them in any way, shape, or form establish a
02:17PM 6 threat to the community, the college campus, Mr. Kershner.
02:17PM 7 But in any event, I would think the latest that they should
02:17PM 8 have to turn it over, I'd prefer it today, is when they submit
02:18PM 9 their witness list.

02:18PM 10 THE COURT: I think that's right. Yeah, I want to
02:18PM 11 give them a little time to take a look at things, Mr. Covert.

02:18PM 12 MR. COVERT: We're fine with that.

02:18PM 13 THE COURT: When they submit their witness list, they
02:18PM 14 should get to you anything that they are going to rely on in
02:18PM 15 the hearing, and the things that -- the categories of
02:18PM 16 documents that you're talking about, I don't see any reason --
02:18PM 17 I mean, unless there are objections to it, in which case you
02:18PM 18 tell me what the objections are. But I just don't see any
02:18PM 19 reason that you could object to the sorts of things Mr. Covert
02:18PM 20 is talking about.

02:18PM 21 MR. COVERT: The only reason I raise this, and I'm a
02:18PM 22 bit weary, is just because we don't -- it's inexplicable that
02:18PM 23 we filed -- and I won't get into chapter and verse, but we
02:18PM 24 filed many, many FOIA requests.

02:18PM 25 THE COURT: I understand.

02:18PM 1 MR. COVERT: And none of them have been complied
02:18PM 2 with. So I really think that we need to not be in a position
02:18PM 3 where we're litigating the disclosure of information.

02:18PM 4 THE COURT: Yep, I understand that. And I hope that
02:18PM 5 that is not going to be the case. If it is, I will rule on
02:18PM 6 things that I have to rule on. But I certainly don't like
02:19PM 7 ambushes, and so I would like the defense to turn over any
02:19PM 8 documents that they are, as I said, going to rely on, or are
02:19PM 9 in the categories that Mr. Covert was talking about to the
02:19PM 10 plaintiff.

02:19PM 11 And, by the same token, the plaintiff should turn
02:19PM 12 over any documents that it has on which it will rely, anything
02:19PM 13 that is relatively relevant to this hearing, to the defense.
02:19PM 14 And let's make that date the same, so everybody turns it over
02:19PM 15 by next Wednesday.

02:19PM 16 MR. COVERT: Very good.

02:19PM 17 THE COURT: Okay.

02:19PM 18 MS. PANTZER: Your Honor, one quick thing. Just
02:19PM 19 because we are going to be in Albany for the trainings, is
02:19PM 20 there any way we can get a little bit of a later start time on
02:19PM 21 the 13th? Do you think that's possible?

02:19PM 22 I don't know if you think it's going to take a full
02:19PM 23 two days. If we do, then maybe not. But I'm thinking maybe
02:19PM 24 like an 11 or afternoon.

02:19PM 25 THE COURT: Yeah, I don't have a problem -- you know

02:19PM 1 what? Let's plan on doing that. And then let's plan on going
02:20PM 2 straight through without a lunch that day.

02:20PM 3 MR. COVERT: Your Honor, I don't know what the
02:20PM 4 Court's rules are, but if we can perhaps go a little bit later
02:20PM 5 on Wednesday --

02:20PM 6 THE COURT: Yeah.

02:20PM 7 MR. COVERT: -- and then agree that we're just going
02:20PM 8 to finish on Thursday, as late as it takes, and as long as it
02:20PM 9 doesn't violate any rules, I want to accommodate their travel
02:20PM 10 schedule, I think they're being reasonable in requesting that.

02:20PM 11 THE COURT: Yeah, and maybe I'll set some time limits
02:20PM 12 just to fit things in so you folks can decide what's important
02:20PM 13 and what's not important and do it that way. We can limit the
02:20PM 14 length of the hearing that way.

02:20PM 15 But, no, I don't see any problem at all with starting
02:20PM 16 at 11 on Wednesday. That seems like a reasonable request, so
02:20PM 17 let's do that.

02:20PM 18 MR. COVERT: Very good.

02:20PM 19 THE COURT: Okay? Anything else we need to do today?

02:21PM 20 MR. COVERT: No, Your Honor.

02:21PM 21 THE COURT: Terrific. Okay. Thanks, everybody. And
02:21PM 22 we'll see you in several weeks.

02:21PM 23 MR. COVERT: Thank you, Your Honor.

02:21PM 24 (Proceeding concluded at 2:21 p.m.)

25 * * * * *

CERTIFICATE OF REPORTER

In accordance with 28, U.S.C., 753(b), I
certify that these original notes are a true and correct
record of proceedings in the United States District Court for
the Western District of New York on August 17, 2023.

s/ Ann M. Sawyer

Ann M. Sawyer, FCRR, RPR, CRR

Official Court Reporter

U.S.D.C., W.D.N.Y.